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G. The Netherlands

(1) Introduction

This country report deals with issues relating to the development of new legislation in the field of environmental and nature protection law in the Netherlands and with the implementation of the 2013 Energy Agreement for Sustainable Growth. In addition, we will discuss relevant case law in nature protection law and a highly interesting civil law suit. We will not discuss some of the topics that were the subject of our country reports in 2012 and 2013, such as shale gas extraction, underground gas storage, and earthquakes in the north of the Netherlands as a consequence of gas exploitation, although there were relevant developments.

(2) Environment and Planning Act

In June, a legislative proposal for an Environment and Planning Act (EPA) was submitted to Parliament (Parliamentary Papers 2013/14, 33 962, no. 2). In both the 2012 and 2013 country reports, we already directed your attention towards this enormous legislative project that will fundamentally change the structure of Dutch environmental law. The government is working on restructuring environmental and spatial planning law in order to integrate the existing legislative acts into one environment and planning act.

The EPA will ultimately contain legislation relating to construction, spatial planning, water, the environment, the natural environment, and nature protection. It will provide an integrated framework for site-specific activities carried out by individuals, businesses, and authorities within the physical environment. The EPA covers, among other things, regulation relating to the assignment of tasks to public authorities, the development of visions and (policy) plans, adopting general rules, and supervision and enforcement. With the EPA, the government aims to achieve the four following goals that should improve environmental law: (1) improving transparency, predictability, and ease of use of environmental law; (2) achieving a coherent approach towards the physical environment in policy, decision making, and regulation; (3) allowing improvements in the administrative scope for consideration by means of an active and flexible approach in order to achieve goals relating to the physical environment; and (4) improving and speeding up the decision-making process with regard to projects in the physical environment.

In 2013, a first draft legislative proposal was sent to the Advisory Division of the Dutch Council of State (Council of State). The critical advice of the Council of State (published in January 2014) prompted the government to amend the draft proposal. In this country report, we highlight one fundamental characteristic of the EPA that received a great deal of criticism by the Council of State—the structure of the act. One of the main issues that the Council of State addressed in its advice is that substantive environmental standards are not included in the draft legislative proposal. The act itself is a framework act in the sense that it provides government authorities with instruments to protect and improve the quality of the environment and to allow for human activities and (spatial) development without setting reference points for balancing these goals. According to the Council of State, at least some European Union (EU) principles that are able to give direction to national policy and regulation should be included in the proposal. The same applies to the assessment framework on the basis of which further substantive standards are adopted or applications for authorizations are tested. The government has not met this criticism in the legislative proposal submitted to Parliament in 2014.

The content of the proposed EPA mainly deals with introducing general provisions on the legal instruments that can or shall be used by the competent public

authorities and include procedures with regard to implementing these instruments. Current substantive environmental standards will largely be delegated to implementing legislation. To be more specific, these rules will be clustered and streamlined in three governmental decrees instead of the current 120. Currently, the government is still working on the structure and content of the governmental decrees, but the government's goal is to improve accessibility and consistency of the entire body of regulations that is currently considered part of Dutch environmental law. In addition, streamlining and clustering at the level of delegated legislative acts will improve the harmonization of rules, for example, on procedures and measuring methods. Lastly, implementing standards by governmental decree will allow for proper and timely implementation of European and international obligations.

However, the proposal does state the goal of the EPA in Article 1.3: 'This Act focuses, for the purpose of sustainable development, on the mutual coherence between a) achieving and maintaining a safe and healthy physical environment and a good quality of the environment, and b) managing, using and developing the physical environment to fulfil social functions effectively.' Of course the general principles of environmental law enshrined in international law are recognized and accepted, but they will not be codified explicitly in the EPA. The Dutch Constitution also does not identify any guiding principle of environmental law. With respect to the general principles that are at the core of European environmental law (see Article 3(3) of the Treaty of the European Union and Article 191 Treaty on the Functioning of the European Union (TFEU)), the explanatory memorandum of the EPA states that the substantive scope of the EPA is actually broader than the principles of environmental law and that those principles are therefore not applicable to all subjects regulated by the legislative proposal for the EPA.

The EPA is still subject to political discussion in the Dutch Parliament. If the legislative process proceeds according to the timetable that the government predicts, the EPA will enter into force in 2018. At this time, a Standing Committee of the House of Representatives is examining the legislative proposal and the accompanying advice from the Council of State. Political groups may propose changes to the bill, make remarks, and pose questions. It is expected that the examination phase will end before the summer of 2015 and that the Cabinet will defend the proposed Environment and Planning Act in a plenary meeting of the House of Representatives for 2015. After the bill is adopted by the House of Representatives, the legislative proposal has to be submitted to, and adopted by, the Senate.

(3) Implementation of the Energy Agreement for Sustainable Growth

In September 2013, an Energy Agreement for Sustainable Growth (Energy Agreement) was agreed upon by more than forty Dutch organizations, institutions, and non-governmental and governmental organizations. In this section, we will briefly focus on the implementation of two specific subjects that were part

of the Energy Agreement. The aim of the Energy Agreement is not only to comply with the EU Directive 2012/27 on Energy Efficiency (saving up to 100 petajoule in a country's final energy consumption by 2020) but also to increase the proportion of energy generated from renewable energy sources (from 4.4 percent in 2012 to 14 percent in 2020 and 16 percent in 2023) as is demanded by EC Directive 2009/28 on the Promotion on the Use of Energy from Renewable Sources. Although it is considered very unlikely that these goals for increasing renewable energy production will be achieved, developing an effective regulatory framework to realize sufficient wind energy generation both onshore (6,000 megawatts in 2020) and offshore (4,450 megawatts in 2020) is one of the main struggles for the Dutch government in 2014. In this respect, 2014 was also a remarkable year. In March, the Dutch government adopted the structural vision on onshore wind energy (*Structuurvisie Windenergie op land*), which entails the decision to designate eleven onshore sites in the Netherlands that will each be the location of a large wind farm in the near future. The Dutch provinces at the regional level all made the necessary arrangements in their spatial plans and policies to allow for a maximum of 6,000 megawatts of wind energy production capacity by the year 2020 in the Netherlands, which is about three times the capacity in 2013. Furthermore, in September 2014, the Dutch government adopted the structural vision on offshore wind energy (*Structuurvisie Windenergie op zee*), which entailed indicating three areas for the development of offshore wind energy. The target stipulated in the Energy Agreement for offshore wind energy production in 2020 has been reduced from 4,450 megawatts to 3,500 megawatts, and a new regulatory regime was announced for 2015 in order to choose suitable sites for offshore wind farms, to grant permits for construction within a reasonable time, and to offer legal certainty to investors about the subsidies for offshore wind farms. With the 2020 deadline approaching, the Dutch government will use this year to prepare the regulatory framework for the first offshore wind tender that should open in December 2015. The House of Representatives adopted the Offshore Wind Energy Act (*Wet windenergie op zee*) in March 2015, and it is expected to enter into force by July 2015. This legislative act is a new step towards completing the regulatory framework for offshore wind parks. It contains the key requirements and criteria for the decision concerning sites for wind farms and for granting wind permits, which is linked to the application for a subsidy. The permit requirements will be further developed in a delegated regulation for which a draft has been published and is open for public consultation. It is the aim of the government to have all of the necessary regulations in place by December 2015 in order to open the tender for two wind farms with a total capacity of 700 megawatts in an offshore zone of approximately 344 square kilometres near the southern border of the Dutch exclusive economic zone.

The second subject relevant for the implementation of the energy agreement concerns the coal-fired power stations that were built in the 1980s. In 2013 and

2014, three newly built coal-fired power stations were opened. The energy agreement states that five selected coal-fired power stations will minimize their capacity; three of those stations would most likely be closed from January 2016 and two others should close from 1 July 2017. In 2014, the Netherlands Authority for Consumers and Markets (ACM), which is the government institution that ensures fair competition between businesses and protects consumer interests, concluded that closing the coal-fired power stations would not be in compliance with competition rules. Although there would be positive effects for the environment, the fact that the price of electricity for consumers would go up infringes on the rules of fair competition. Therefore, the Dutch government decided in July 2014 that closing the five coal-fired power stations would not be mandatory. Instead, it conceived to set stricter standards for power stations. A draft of these stricter standards for large combustion plants was published in December 2014; they will be incorporated in the activities decree based on the Environmental Management Act (*Activiteitenbesluit milieubeheer*) and states that the net electrical efficiency of a large combustion plant fuelled by coal or a combination of coal and one or more other fuels should be at least 40 percent. The idea is that these stricter standards will have an equivalent effect on the environment as closing the older coal-fired power stations. The government is confident that setting standards for electrical efficiency of large combustion plants will not violate Article 9(1)(2) of the EU Directive 2010/75 on Industrial Emissions and EC Directive 2009/29 So As to Improve and Extend the Greenhouse Gas Emission Allowance Trading Scheme of the Community, which regulates the possibilities for EU member states to set emission limit values for greenhouse gas emissions and impose requirements relating to energy efficiency in respect of combustion units.

(4) Nature Protection

(A) Restructuring Nature Conservation Legislation

In the 2012 country report, we discussed the legislative proposal of the Nature Conservation Act (*Wet natuurbescherming*) that was sent to the House of Representatives in September 2012. It received a lot of criticism from non-governmental organizations and institutions, scholars, and the Advisory Division of the Dutch Council of State. There were serious doubts whether that 2012 legislative proposal was in line with EEC Directive 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora and EC Directive 79/409 on the Conservation of Wild Birds. A change of government in 2013 brought a new mindset concerning nature protection. While the legislative proposal presented in 2012 started from a rather minimalistic approach of nature protection, the new government wanted to base the new bill on a broader approach to nature protection. In June, an amended legislative proposal for the new Nature Conservation Act was submitted to Parliament (Parliamentary Papers 2013/14, 33 348, No. 5).

The main goal of the readjusted legislative proposal is still to simplify the current nature conservation legislation by integrating three existing acts in the field of nature protection into a single Nature Conservation Act. What is new, for example, is the reference to the intrinsic value of nature in Article 1.8a(1), giving effect to the preamble of the Convention on Biological Diversity. Article 1.8a stipulates the goal of the proposed Nature Conservation Act: 'This law is aimed at: a. the preservation and development of nature, partly because of the intrinsic value, and the preservation and restoration of the biological diversity, and b. managing the efficient use and development of nature in order to fulfill societal functions.' This provision is in line with the proposed Article 1.3 of the Environment and Planning Act in which the Nature Conservation Act will be incorporated once the EPA comes into force. Another amended aspect is that the Dutch provinces will get the lead in implementing nature protection policy. The provinces are obliged, for example, to establish a strategic plan relating to nature protection and are also responsible for taking proactive protective measures in order to allow for a favourable conservation status. Something completely different is that the species that were added to the list of species that are subject to hunting on the basis of a plan in the 2012 proposal (for example, fallow deer and wild boar) are now deleted in the readjusted 2014 proposal.

(B) *Briels* Case

In *TC Briels and Others v Minister van Infrastructuur en Milieu*, the European Court of Justice (ECJ) further clarified the rules of the Habitat Directive (15 May 2014, Case C-521/12). At its core, the ruling concerns the distinction between mitigating measures and compensatory measures. The *Briels* case was judged by the ECJ on a reference for a preliminary ruling under Article 267 of the TFEU from the Dutch Council of State. The questions of the Council of State concerned the application of Article 6 of the Habitat Directive, which sets out the legal consequences when national authorities designate an area as a special area of conservation. Special areas of conservation are designated with a view to setting up a coherent European ecological network of such areas (the Natura 2000 network). The protection regime for these sites is not absolute. From Article 6 of the Habitat Directive, it follows that member states may under certain conditions allow plans or projects that can have an adverse impact on nature. In short, Article 6(3) of the Habitat Directive requires an appropriate assessment to examine if a plan or project will have a negative effect that will adversely affect the integrity of the site and whether there is an alternative solution. From Article 6(4) of the Habitat Directive, it follows that when an assessment is negative and there are no alternatives, a plan or project may nevertheless be carried out if there are imperative reasons of overriding public interest and the member state takes all compensatory measures necessary to ensure that the overall coherence of the Natura 2000 network is protected.

In the *Briels* case, the minister adopted an order relating to the A2 motorway project concerning the widening of that motorway. The project affects the designated Natura 2000 site Vlijmens Ven, Moerputten and Bossche Broek, in particular, which is an example of a natural habitat type known as molinia meadows, which is a non-priority habitat type. The assessment concluded that the A2 motorway project would have negative implications for the existing area comprising the habitat type molinia meadows (drying out and acidification of molinia meadows due to nitrogen deposits). The order by the minister provided for several measures that are aimed at diminishing the environmental impact of the A2 motorway project. The project provides for improvements to the hydrological situation in the Vlijmens Ven, which will allow the molinia meadows to expand on the site. According to the minister, this will allow for the development of a larger area of molinia meadows of higher quality, thereby ensuring that the conservation objectives for this habitat type are maintained through the creation of new molinia meadows. However, Briels and others are of the opinion that the development of new molinia meadows on the site, as provided for by the ministerial order at issue in the main proceedings, should not be taken into account in the determination of whether the site's integrity was affected. They argue that such a measure cannot be categorized as a mitigating measure preventing the application of Article 6(4) of the Habitat Directive.

The Dutch Council of State referred the following question to the ECJ for a preliminary ruling: must Article 6(3) of the Habitat Directive be interpreted as meaning that a plan or project not directly connected with, or necessary to, the management of a site of community importance, which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, have an effect on the integrity of that site and, if so, whether such measures may be categorized as compensatory measures within the meaning of Article 6(4) thereof? The ECJ rejected the view of the minister and considered the measures to be compensatory measures. The ECJ's ruling clarifies that protected measures provided for in a project, which are aimed at compensating for negative effects of the project on a Natura 2000 site, cannot be taken into account in the appropriate assessment of the implications of the project provided for in Article 6(3) of the Habitat Directive. The measures provided for by the order of the minister are not aimed at either avoiding or reducing the significant adverse effects for that habitat type caused by the A2 motorway project. They tend to compensate after the fact for those effects. This means that authorization for the project needs to be given in accordance with the procedure of Article 6(4) of the Habitat Directive. This procedure is more lengthy, and the outcome less certain.

It is expected that the ECJ ruling in the *Briels* case will have a major impact in Dutch practice. An initiator of a project will on more occasions than before the ruling have to meet the criteria set out in Article 6(4) of the Habitat Directive. Especially the underpinning of 'imperative reasons of overriding public interest'

will be a difficult or even impossible hurdle to take for initiators of relatively small (private) projects, such as farmers that wish to increase their cattle stock.

In the same line of reasoning, there are serious doubts among Dutch scholars whether or not the future so-called programmatic approach to nitrogen is in line with Article 6(3) of the Habitat Directive. This approach, which enters into force in July 2015, aims to merge economic development with the realization over time of the conservation goals of designated Natura 2000 sites. After the *Briels* case, it has been questioned whether area measures included in the program can be qualified as mitigating measures. If not, the implications for the livestock sector will be significant. Farmers seeking permission for expanding their stock will encounter the barriers of Article 6(4) of the Habitat Directive.

(5) Civil Lawsuit Demands Measures Reducing Carbon Dioxide Emissions by the Dutch State

In November 2013, a civil lawsuit was filed by the Dutch foundation, Urgenda, and some 900 co-plaintiffs (<<http://www.urgenda.nl/en/climate-case/>>). Urgenda was founded in 2007 with the objective of promoting a fast transition towards a sustainable society, with a focus on the transition towards a circular economy using only renewable energy. Climate change is of course also one of the topics that Urgenda is involved in. The so-called climate case was initiated in November 2012 by writing a letter to the government of the Netherlands stating that there is undeniable scientific proof that the EU's promise to reduce emissions by 20 percent compared to 1990 is simply not enough to avert dangerous climate change and that the Dutch reduction targets derived from this European target are therefore equally inadequate. The letter therefore demands more action by the Dutch state in light of its obligation to reduce greenhouse gas emissions. The idea for filing such a climate case on the basis of liability for unlawful negligence originates from the book *Revolution Justified* (Roger H.J. Cox, *Revolution Justified*, Maastricht: Planet Prosperity Foundation, 2012). The author is one of the lawyers representing Urgenda. The plaintiff requests the court to declare that global warming of more than two degrees Celsius will lead to a violation of fundamental human rights worldwide, that the Dutch state is acting unlawfully by not contributing its proportional share to preventing a global warming of more than two degrees Celsius, and that the Dutch state must be ordered to drastically reduce Dutch carbon dioxide emissions even before 2020 to the level that has been determined by scientists to be in line with less than two degrees Celsius of global warming—that is, to reduce Dutch emissions by 40 percent by 2020 below 1990 levels. On 14 April 2015, the district court in The Hague heard the arguments of the parties.

The key question is of course whether and to what extent, in the absence of explicit treaties, states have a legal obligation to reduce their greenhouse gas emissions. How much do human rights and other sources of law require each

state to reduce emissions, even in the absence of a specific treaty? The Dutch professor Jaap Spier, who is also an advocate-general at the Dutch Supreme Court, has argued that (tort) law could and should serve as an instrument to demand governments to act against climate change and global warming. Together with the German philosopher Thomas Pogge of Yale University, he was one of the initiators of the so-called Oslo Principles on Global Obligations to Reduce Climate Change (Oslo Principles), which were adopted by a group of experts in international law, human rights law, and environmental law in Oslo on 1 March 2015 (<<http://www.osloprinciples.org>>). With a dominant role for the precautionary principle, the Oslo Principles set out existing obligations regarding the climate and provide a detailed legal analysis that draws on the best joint interpretation of international law, human rights law, national environmental law, and tort law. It states that the precautionary principle requires that 'GHG emissions be reduced to the extent, and at a pace, necessary to protect against the threats of climate change that can still be avoided' and that 'the level of reductions of GHG emissions required to achieve this, should be based on any credible and realistic worst-case scenario accepted by a substantial number of eminent climate change experts.' The document goes on to stipulate that states have a duty and an obligation to reduce greenhouse gas emissions. The Oslo Principles aim to help judges decide whether particular governments are in compliance with their legal obligations to address climate change. Will the Dutch courts be among the first to adhere to these Oslo Principles? Dutch lawyers are anxiously awaiting the verdict of the Dutch District Court of The Hague, which is expected to be pronounced on 24 June 2015.

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